Enloe Medical Center *and* Health Care Workers Union, Service Employees International Union, Local 250.[1] Cases 20–CA–31806–1, 20-RC–17937, 20-RC–17938, and 20-RC–17939

August 27, 2005

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 14, 2005, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed reply briefs to both answering briefs. Additionally, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

The judge found that the Respondent violated Section 8(a)(1) of the Act by requiring employees to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU," and he dismissed complaint allegations that the Respondent violated Section 8(a)(1) by interrogating employees and by promulgating a rule that prohibited the placement of union literature in the employee breakroom. Additionally, the judge overruled the Respondent's election objections, which concerned the election in the service unit.

For the reasons stated below, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by requiring employees to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU." We also adopt the judge's dismissal of the complaint allegation that the Respondent unlawfully interrogated employees.[4] As explained below, we reverse the judge and find that the Respondent violated Section 8(a)(1) by promulgating a rule prohibiting the placement of union literature in the employee breakroom. Finally, we adopt, for the reasons stated by the judge, his overruling of the Respondent's election objections.[5] We, therefore, certify the Union as the exclusive bargaining representative of the employees in the service unit.[6]

1. Requiring employees to remove or cover badges

After the Union started its organizing campaign in 2003, employees who were organizing committee members began wearing lanyards around their necks with a 4-1/2 by 2-1/2 inch plastic card or badge attached. One side of the badge displayed the statement, "Ask me about our union!" The other side displayed the union's logo and the words "COMMITTEE PERSON." The Respondent thereafter issued a memo to all employees, which stated:

> As you should know, our policy regarding solicitation and distribution of literature prohibits solicitation during employee working time. It also prohibits solicitation at all times in immediate patient care areas. We also prohibit the solicitation of patients, family and visitors by employees on hospital premises.

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the violations found and in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

[4] As discussed in fn. 13, below, Member Liebman would reverse the judge and find that the Respondent unlawfully interrogated employees in violation of Sec. 8(a)(1).

[5] There are no exceptions to the judge's dismissal of a complaint allegation that the Respondent violated Sec. 8(a)(1) when a security guard told employee Taylor that he was not allowed to block the sidewalk or interfere with employees entering the building. Nor are there exceptions to the judge's dismissal of the Union's election objections, which concerned the election in the technical unit. As there are no exceptions to the dismissal of the Union's election objections, it is unnecessary for us to pass on the Respondent's exceptions relating to those objections.

[6] We correct the judge's terminology, in the last sentence of sec. IV,C,3,e of his decision and in his conclusion of law 5, where he recommended that the "results" of the election be certified. Because the Union prevailed in the election in Case 20–RC–17938, we issue a "certification of representative."

Additionally, in sec. IV,A of his decision, the judge inadvertently stated, regarding the technical unit election, that "the Employer" received a majority of the votes cast. A majority of votes were cast against union representation. Similarly, the judge erroneously stated, in the same section of his decision, that, in the service unit election, there were 263 votes in favor of the Union and 245 votes "in favor of the Employer." We correct his statement to read that, in the service unit election, there were 263 votes in favor of the Union and 245 votes against the Union.

> In the past, we have not prohibited the wearing of reasonably sized buttons, pins or identification badge lanyards that bear the name of an organization, or that contain a message that is not in conflict with our primary mission, which is to provide quality patient care in an appropriate environment.
>
> It has become apparent, however, that some SEIU supporters are not following Enloe's solicitation policy. The wearing of buttons or lanyard tags reading, "Ask Me About SEIU" is a direct solicitation to the reader and therefore a violation of Enloe policy. The person who reads the button may be another employee, a patient, a patient family member or other hospital visitor. Since the buttons and lanyard tags are being worn in work areas, patient care areas, and in fact throughout the hospital, we consider the wearing of such buttons and lanyard tags to be a violation of the solicitation policy.
>
> We request that all employees cease wearing these buttons in the interior of the hospital, unless they limit their use to non-patient care areas and areas where patients, families and visitors do not frequent, and only wear them during non-working time. Failure to comply with this request will be considered a violation of Enloe policy.

Pursuant to this memo, supervisors subsequently required some committee members to cover the language "Ask me about our union!" on their badges or to remove the badges.

The judge found that the Respondent violated Section 8(a)(1) by requiring employees to remove or cover the badges. He found, contrary to the Respondent, that the language "Ask me about our union" on the badges did not constitute solicitation. The judge found the issue controlled by *Wal-Mart Stores, Inc*., 340 NLRB No. 76 (2003), enfd. as modified 400 F.3d 1093 (8th Cir. 2005), where the Board found that an employee's wearing a union T-shirt that bore the words "Sign a card . . . Ask me how" did not constitute solicitation.[7]

Although we agree that the Respondent violated Section 8(a)(1) by requiring employees to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU," we do so on the following basis.[8] Thus, even were we to find, as the Respondent contends, that employees' wearing of such badges constituted solicitation, the Respondent's rule would, nonetheless, be unlawful as overbroad. It is well settled that employers generally may ban solicitation by employees during working time, but that rules prohibiting employee solicitation during nonworktime violate Section 8(a)(1) unless justified by a showing of special circumstances making the rules necessary to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc*., 268 NLRB 394 (1983); *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962). In addition, health care institutions, such as the Respondent, are entitled to ban solicitation at *any* time in "patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495 (1978); *St. John's Hospital*, 222 NLRB 1150 (1976), enf. granted in part, denied in part 557 F.2d 1368 (10th Cir. 1977). Outside patient care areas, however, a hospital may ban solicitation during nonworktime only where it is shown to be necessary to avoid disruption of patient care or disturbance of patients. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 779 (1979); *UCSF Stanford Health Care*, 335 NLRB 488, 527–535 (2001), enfd. in relevant part, 325 F.3d 334 (D.C. Cir. 2003), cert. denied 540 U.S. 1104 (2004).

The Respondent's rule barred employees from wearing the badges not only in patient-care areas, but also in nonpatient-care areas that patients, families, and visitors frequented. Thus, the Respondent's memo to employees stated:

> We request that all employees cease wearing these buttons in the interior of the hospital, unless they limit their use to non-patient care areas *and areas where patients, families and visitors do not frequent*, and only wear them during non-working time. Failure to comply with this request will be considered a violation of Enloe policy. [Emphasis added.]

Thus, in requiring employees to limit their wearing of the badges to nonpatient-care areas that patients, families, and visitors do not frequent, the rule set forth in the Respondent's memo exceeded the restrictions that would be presumptively valid under our law, even assuming that the activity addressed by the memo were deemed solicitation.

Consequently, the Respondent's overbroad rule is unlawful unless the Respondent shows that the rule was necessary to avoid disruption of patient care or disturbance of patients. The Respondent, however, has made no such showing. Rather, the Respondent contends that it was entitled to prohibit the wearing of badges in areas other than patient care areas because it would have been impractical for employees to remove their badges each time they entered patient care areas. The Respondent relies on *Casa San Miguel, Inc*., 320 NLRB 534 (1995), where a nursing home prohibited a nursing assistant from

[7] Chairman Battista dissented in *Wal-Mart*. Member Schaumber did not participate in the case.

[8] Member Liebman, while joining in the rationale set forth herein, also agrees with the judge's reasoning that the Respondent's rule was unlawful because the language on the badges did not constitute solicitation.

wearing a smock with a union slogan and emblem printed on it. While a health care institution's barring the wearing of union insignia outside of patient care areas is presumptively unlawful, the Board found that "special circumstances" justified the nursing home's prohibition on wearing the smock:

> Unlike . . . situations . . . when an employee *attaches* something to the employee's work uniform, such as a union button, which indicates that the employee is supporting union representation, the Union's insignia and message involved in this case was a part of the employees' uniform and could not be removed. It is not practical or possible for an employee when in nonpatient care areas to wear a uniform with a printed prounion emblem and message on the front, and then to change out of that uniform, each time the employee enters a patient care area. [Id. at 540.]

The circumstances presented in *Casa San Miguel*, however, are absent here. In the instant case, the "Ask me about our union" language was not printed on the employees' uniforms. Rather, it was displayed on a badge clipped to a lanyard. Thus, nothing prevented employees from removing their badges when entering patient care areas. That employees might find it cumbersome to remove and later put back on their badges when moving in and out of patient care areas—and might even ultimately find it impractical to do so—does not justify the Respondent's effectively deciding this for them by flatly prohibiting employees from wearing the union badges in both patient-care and nonpatient-care areas (other than nonpatient-care areas that patients, families, and visitors do not frequent). Accordingly, we agree with the judge's finding that the Respondent's requiring employees, pursuant to its overbroad rule, to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU" violated Section 8(a)(1).[9]

2. Alleged interrogation

In January 2004, Kerry Cannell, the Respondent's nurse manager of Home Care Services, conducted a disciplinary interview with nurse Beth Denham regarding Denham's telephone solicitation for the Union from a patient's home.[10] There is no contention that either the interview or the discipline was unlawful.

In the interview, Denham was accompanied by employees Ron Taylor and Kathy Lambert, whom she brought for support. Taylor was a member of the Union's "rapid response team," a group of activists designated by the Union to represent or support employees vis-à-vis management. Taylor and, apparently, Lambert were wearing union lanyards. Denham, Taylor, and Lambert were all open union supporters.

During the interview, Cannell asked the three employees "off the record" why they believed that they needed a union. Taylor answered, citing decreasing health benefits coupled with increasing costs, and a feeling of distrust and lack of the family feeling that had prevailed in the past. Cannell responded, "Well, I have some problems with the way things are done." The conversation lasted about 5 or 10 minutes.

The judge dismissed the complaint allegation that Cannell's single question constituted coercive interrogation violative of Section 8(a)(1). He found that Denham, Taylor, and Lambert were union advocates and that Cannell, in a personal and nonconfrontational manner, was simply attempting to ascertain, from visible union activists, why they believed that a union was needed. Noting that Taylor, as spokesman, was not reluctant to respond and that Cannell stated that she too had some problems with the way things were done around the hospital, the judge found that, under the circumstances, Cannell's question did not constitute a coercive interrogation. We agree.

An employer violates Section 8(a)(1) by interrogating an employee only if, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In the present case, Denham, Taylor, and Lambert were open union supporters—indeed Taylor was a member of the Union's "rapid response team"—and Cannell merely asked the single "off the record" question as to why they felt a union was needed. When Taylor listed some employee concerns, Cannell merely responded that she too had some problems with how the hospital was being operated. No further inquiry was made about the Union.

Our dissenting colleague contends that Cannell's question was coercive, because, she argues: the questioning occurred against a background of the Respondent's unfair labor practices; there was no apparent reason for Cannell's question; Cannell failed to assure the employees that they need not answer or that their answers would not affect their jobs; and the questioning was conducted by a high level manager, in her office, during a discipli-

[9] In finding this violation, we find it unnecessary to pass on the Respondent's contention that Supervisor Donna Loshe's prohibiting employees from wearing the "Ask me about our union" badge, alleged in subparagraph 6(a) of the complaint, did not occur within the 10(b) period. Rather, in finding that the Respondent violated Sec. 8(a)(1) by requiring employees to remove or cover such badges, we rely on the incidents of similar conduct alleged in subparagraphs 6(b)–6(e) of the complaint, the timeliness of which is undisputed.

[10] The judge inadvertently stated that this interview occurred in January 2003.

nary meeting related to Denham's union activity. We disagree.

Regarding the asserted background of unfair labor practices, we are finding, apart from the alleged interrogation, that the Respondent committed two violations of Section 8(a)(1). It unlawfully required employees to remove or cover badges stating "Ask me about our union" or "Ask me about SEIU," and it unlawfully sent employees an e-mail message prohibiting the placement of union literature in the breakroom. Only the former violation predated Cannell's questioning of the employees. Moreover, these two violations bore little, if any, relationship to the alleged interrogation.[11] Further, the violations that the Respondent committed did not include any threats, discharges, or other discriminatory treatment of union supporters, or other violations of a similar nature that might provide a coercive context to a subsequent interrogation.

Our dissenting colleague asserts that there was no apparent reason for Cannell's asking the employees why they thought that they needed to have a union. To the contrary, in our view, it is not unusual for an employer, when a union organizing campaign is underway among its employees, to wonder why employees thought that they needed to have a union. In this regard, Cannell posed the question to three employees whose union support was well established. Taylor readily answered the question and explained, at some length, the problems employees perceived at the hospital. Cannell's response acknowledged that there were problems.

Finally, we disagree with our colleague that other circumstances of Cannell's questioning rendered it coercive. Although the question was asked in Cannell's office during a disciplinary meeting, the meeting and discipline were themselves lawful, and Cannell's question was a simple inquiry to open union activists—including Taylor who was a union spokesperson for employees via its "rapid response team"—as to why employees desired union representation.[12] Considering Cannell's question in this context, we agree with the judge that it was not coercive and did not violate Section 8(a)(1).[13]

3. Restriction against posting union literature

The Respondent sent an e-mail message to employees dated February 19, 2004, stating:

> As we discussed in our staff meetings, it is not appropriate for union literature to be handed out in your work area or placed in our break room. Please ensure that you are adhering to Enloe policy.

The judge dismissed the complaint allegation that the Respondent's e-mail message prohibiting the placing of union literature in the breakroom violated Section 8(a)(1). He found that the e-mail did not preclude employees from handing out union literature in the breakroom or that employees were in fact barred from doing so. Citing *Page Avjet, Inc*., 278 NLRB 444 (1986), and *North American Refractories Co.*, 331 NLRB 1640, 1642–1643 (2000), the

[11] See *Temp Masters, Inc.*, 344 NLRB No. 142 (2005) (relationship of other unfair labor practices to alleged interrogation examined in determining whether interrogation was unlawful).

[12] *Stoody Co*., 320 NLRB 18 (1995), cited by the dissent, is distinguishable. In that case, employee Jaggers, unaccompanied by any fellow union supporters, was called to Production Manager Renken's office, where Supervisor Hugelmaier was also present. Renken threatened Jaggers that he would be written up for insubordination if he did not sign his evaluation or give a written statement explaining his refusal to do so. Jaggers, nevertheless, refused to sign the evaluation or give a written explanation. Renken then wrote up Jaggers for insubordination and told him that he would be further disciplined if he did not sign the write-up. Jaggers signed the write-up. Immediately following this confrontation, Renken questioned Jaggers about why he was for the Union. We find that these facts are significantly different from those in the present case, where Cannell and Denham had no similar hostile confrontation and Denham was accompanied by two other prounion employees.

[13] Contrary to the majority, Member Liebman would reverse the judge's dismissal of the allegation that Kerry Cannell, Respondent's nurse manager of Home Care Services unlawfully interrogated employees about the Union. The judge found the questioning noncoercive, citing Cannell's "personal and non-confrontational manner" and one employee's lack of reluctance in responding. The incident occurred when Cannell summoned licensed vocational nurse Beth Denham into her office for a disciplinary counseling about Denham's telephone solicitation on behalf of the Union from a patient's home where she was providing therapy. At the counseling, Denham was accompanied by two fellow employees who were members of the Union's "rapid response team" and who were both wearing pro-Union cards on lanyards around their necks. At some point Cannell strayed from the announced purpose of the meeting and asked the employees "off the record" why they thought they needed a union. Ron Taylor, one of the employees, cited various working conditions that contributed to employee dissatisfaction. The exchange lasted from 5 to 10 minutes. In Member Liebman's view, the background, setting, and nature of the interrogation, as well as the identity of the questioner establish its coerciveness.

The questioning was conducted by a high level manager who was Denham's department head, in her office, "the core of management authority," in the context of a disciplinary meeting that related to Denham's union activity. *Stoody Co.*, supra. There was no apparent reason for Cannell's questioning the employees about their union sentiments, and no evidence that Cannell assured the employees in her captive audience that they did not have to answer her questions, or that their answers would not affect their jobs. *Multi-Ad Services*, 331 NLRB 1226 (2000). Further, the questioning occurred against a background of the Respondent's other unlawful efforts to quell union activity. Prior to the disciplinary meeting, the Respondent had unlawfully prohibited employees from wearing the union lanyards, and after the meeting it issued an unlawful directive banning union materials from being placed in the breakroom. In all these circumstances, Member Liebman would find that Cannell's questioning was coercive and not the kind of casual questioning permitted under the Act.

judge found that employers may prohibit the leaving of materials in nonwork areas.

Contrary to the judge, we find that the Respondent's e-mail message barring the placing of union literature in the breakroom violated Section 8(a)(1).[14] The e-mail message was discriminatory on its face. The message barred solely union literature from being placed in the breakroom. As the message barred only union literature, and no other, from being placed in the breakroom, it violated Section 8(a)(1).[15] See *Parsippany Hotel Management Co.*, 319 NLRB 114, 125 (1995) (rule prohibiting solicitation solely of union authorization cards found unlawful), enfd. 99 F.3d 413 (D.C. Cir. 1996); *Montgomery Ward*, 269 NLRB 598, 599 (1984) (rule prohibiting distribution of union literature only found unlawful). Accordingly, we reverse the judge and find that the Respondent's e-mail message violated Section 8(a)(1) insofar as it prohibited the placement of union literature in the breakroom.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Enloe Medical Center, Chico, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

"(b) Prohibiting employees from placing union literature in the break room."

2. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facility in Chico, California, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2003."

3. Substitute the attached notice for that of the administrative law judge.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots in Case 20–RC–17938 have been cast for Health Care Workers Union, Service Employees International Union, Local 250, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time service employees, including Anesthesia Techs, Cancer Registrars, Cardio Cath Lab Aides, Case Management Assistants, Distribution Clerks, EMS Communication Specialists, Technologist Assistants, Van Drivers, Van Drivers/Techs, Receptionists/Van Drivers, Sterile Processing Techs, Cardiovascular Techs (non-invasive), Certified Cardiovascular Techs (non-invasive), E.D. Techs, Homemakers, Clinic Techs (except for the Clinic Techs working in the Employer's Los Molinos Clinic, who are eligible to vote subject to challenge), Transcriptionists I & II, Medical Records Clerks, Mental Health Workers, Monitor Techs, CNAs, CNAs-HHAs, Data Analysts, Chart Analysts, Clerk/Technicians, Lab Assistants, Nursing Assistants I & II, Patient Monitors, Patient Access Reps, Department Clerks (non-business office), Distribution Couriers, Information Clerks, OR Aides, Schedulers, Ortho Techs, Liaisons, Perinatal Techs, Pharmacy Techs, Personal Fitters, RT Equipment Techs, Rehab Aides, Rehab Technicians, Repair Technicians, Surgical Supply Techs, Systems Technicians, Unit Secretaries/CNAs, Unit Secretaries/NAIs, Unit Secretaries, Warehouse Technicians, Workers Comp Liaisons, Patient Support Clerks (non-business office) (except for the Patient Support Clerks working in the Employer's Los Molinos Clinic, who are eligible to vote subject to challenge), Facility Workers, Transporters, CNAs/Transporters, Lead Distribution Clerks, Lead Sterile Processing Techs, Lead Information Desk Clerks, Lead Patient Support Clerks, Switchboard Operators, Support Group Facilitators, G.I. Techs, and Computer Operators employed by Enloe Medical Center at its current Butte County, California, facilities.

[14] The complaint did not allege that the e-mail message was unlawful insofar as it prohibited the handing out of union literature in work areas.

[15] Thus, we find it unnecessary to pass on the judge's finding that employers may prohibit the leaving of materials, including union literature, in nonwork areas.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require you to remove or cover union identification badges that state "Ask me about our union," or "Ask me about SEIU."

WE WILL NOT prohibit you from placing union literature in the breakroom.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

ENLOE MEDICAL CENTER

Kathleen C. Schneider, Esq. and *Ashok Carlos Bodke, Esq.*, for the General Counsel.

Laurence R. Arnold, Esq. (Foley & Lardner LLP), of San Francisco, California, for the Respondent/Employer.

Robert J. Wenbourne, Esq. (of Foley & Lardner LLP), of Sacramento, California, for the Respondent/Employer.

Bruce A. Harland, Esq. (Weinberg, Roger & Rosenfeld), of Oakland, California, for the Union.

DECISION AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to a notice of hearing in this matter was held before me in Chico, California, on August 10, 11, and 12, and November 2, 3, and 4, 2004. The charge in Case 20–CA–31806–1 was filed on March 21, 2004 by Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO (Union). An amended charge was filed by the Union on May 28, 2004. On May 28, 2004, the Regional Director for Region 20 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by Enloe Medical Center (Respondent or Employer) of Section 8(a)(1) of the National Labor Relations Act (Act). The Respondent, in its answer to the complaint, denies that it has violated the Act as alleged.

On July 22, 2004, the Acting Regional Director for Region 20 of the Board issued a report on challenged ballots, objections to elections, order consolidating cases, and notice of hearing in the captioned matters, consolidating the representation cases with the unfair labor practice proceeding.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel), counsel for the Union, and counsel for the Respondent.

Upon the entire record,[1] and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California nonprofit public benefit corporation with a facility in Chico, California, where it is engaged in business as an acute care hospital with ancillary clinics and a Home Health Care operation. The Respondent annually derives gross revenues from its business operations valued in excess of $250,000, and annually purchases and receives goods valued in excess of $5000 from points outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in the unfair labor practice proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by prohibiting on-duty employees from wearing union

[1] The Employer's December 29, 2004, unopposed motion to reopen the record to receive documents is granted, and the documents attached to that motion are hereby received into evidence.

identification cards containing the words, "Ask me about our Union," or "Ask me about SEIU"; and whether the Respondent has violated Section 8(a)(1) of the Act by promulgating an overly broad no-solicitation rule prohibiting employees from distributing union literature in breakrooms.

B. Facts

1. The SEIU lanyard and identification card

After the Union began its organizing campaign in 2003, members of the Union's organizing committee began wearing lanyards at work. The lanyard is 3/4 of an inch wide and is designed to be worn around the neck. It is purple, with large, conspicuous, clearly legible lettering, gold in color, extending for 9 inches on each side, stating: SEIU 250 Stronger Together SEIU 250." At the end of the lanyard is a plastic attachment with a swivel hook. Attached to the swivel hook is a plastic card 4-1/2 inches by 2-1/2 inches. One side of the card is purple and contains the Union's logo with the word "COMMITTEE PERSON" at the bottom in large letters. The other side of the card is yellow and, in bold purple lettering, states, "Ask me about our union!"

To show support for the Union, employees began wearing the above-described lanyards, with the attached cards, in about September 2003. Thereafter, the Respondent issued a memorandum to all employees and advised them, inter alia, as follows:

> As you should know, our policy regarding solicitation and distribution of literature prohibits solicitation during employee working time. It also prohibits solicitation at all times in immediate patient care areas. We also prohibit the solicitation of patients, family and visitors by employees on hospital premises.
>
> In the past, we have not prohibited the wearing of reasonably sized buttons, pins or identification badge lanyards that bear the name of an organization, or that contain a message that is not in conflict with our primary mission, which is to provide quality patient care in an appropriate environment.
>
> It has become apparent, however, that some SEIU supporters are not following Enloe's solicitation policy. The wearing of buttons or lanyard tags reading, "Ask Me About SEIU" is a direct solicitation to the reader and therefore a violation of Enloe policy. The person who reads the button may be another employee, a patient, a patient family member or other hospital visitor. Since the buttons and lanyard tags are being worn in work areas, patient care areas, and in fact throughout the hospital, we consider the wearing of such buttons and lanyard tags to be a violation of the solicitation policy.
>
> We request that all employees cease wearing these buttons in the interior of the hospital, unless they limit their use to non-patient care areas and areas where patients, families and visitors do not frequent, and only wear them during non-working time. Failure to comply with this request will be considered a violation of Enloe policy.

The Respondent, during the course of the Union's organizing and preelection campaign, permitted its employees to wear the lanyards at work. However, it took the position that the "Ask me about our union!"[2] wording on one side of the attached committee-member card would have the effect of inviting employees to ask committee members about the Union during work and therefore constituted, contrary to the Respondent's policy, impermissible on-the-job solicitation. As a result, the Respondent required committee members who wanted to continue wearing these cards on their lanyards, to cover or tape over the "Ask me about" language. Apparently, all committee members did so.[3]

It is the position of the General Counsel, relying on *Wal-Mart Stores, Inc.*, 340 NLRB No. 76 (2003),[4] that the Respondent violated Section 8(a)(1) of the Act by requiring committee members to cover the "Ask me about" language on their cards. In *Wal-Mart*, the employer reprimanded and removed from its store an employee who was wearing a self-made T-shirt that read, "Union Teamsters" on the front and "Sign a card . . . Ask me how" on the back. The employer took the position that the "Ask me how" language constituted solicitation in violation of the employer's lawful policy to preclude solicitation during work. The Board disagreed, and found that the "Ask me how" language did not constitute solicitation and was not tantamount to a verbal solicitation because the language did not call for an immediate response; rather, the Board found the language to be analogous to the words, "vote" or "join" on union insignia and conveyed no ideas not implied in a button or T-shirt containing only the union's name. Thus it appears that, consistent with *Wal-Mart*, the language on both the lanyard and on the side of the card containing the union logo and the words "COMMITTEE PERSON,'' convey the same ideas as the prohibited "Ask me about" side of the card; all are simply indicia of union support or advocacy.

There does appear to be a difference however: the lanyard is merely an indication of union support and was worn by many union supporters who were not committee members. The lanyard and card together, however, denote a union supporter whom the Union has designated as an authoritative representative ostensibly qualified to answer employee questions regarding the Union. Thus, for example, Linda Nelson, a committee person, testified that even though she taped over the "Ask me about" part of her card because of the Respondent's objection to this language, nevertheless the "COMMITTEE PERSON" side of the card let "other people know they could come to me." Accordingly, it is clear that the "Ask me about" side of the card and the "COMMITTEE PERSON" side of the card are designed to serve the same basic function, namely, to identify

---

[2] It appears that one side of the card attached to the lanyard states, "Ask me about our union," rather than "Ask Me About SEIU."

[3] It seems unnecessary to recount the circumstances under which some committee members were confronted by their supervisors about this language on their cards, as each individual was simply made aware of the Respondent's position and was required to cover up the "Ask me about" portion of the card or, in the alternative, to remove the card and simply wear the lanyard.

[4] It should be noted that the Respondent's policy regarding the "Ask me about" language was being implemented prior to the date of this decision.

knowledgeable union advocates and invite inquiries about the Union.

While the Respondent, in its brief, strongly disagrees with the *Wal-Mart* decision, and urges that the correct analysis of the issue is contained in the dissenting opinion in that case, nevertheless the majority opinion in *Wal-Mart* is controlling. Therefore I find that by requiring the committee members to cover the "Ask me about" language on one side of the card the Respondent has violated Section 8(a)(1) of the Act, as such language does not constitute on-the-job solicitation.[5]

2. The alleged overly broad no-solicitation rule

The complaint alleges that the Respondent promulgated an overly broad no-solicitation rule by issuing an e-mail to employees dated February 19, 2004, entitled "Union Literature." The e-mail states:

> As we discussed in our staff meetings, it is not appropriate for union literature to be handed out in your work area or *placed* in our breakroom. Please ensure that you are adhering to Enloe policy. (Emphasis supplied.)

The Respondent has a written policy regarding distribution of literature, as follows:

> The placing of materials for distribution on counters, shelves, tables, etc., is not permitted as it leads to clutter and litter problems, and increases the burden upon those charged with maintaining the cleanliness of the facilities.

There is no allegation that this rule was enforced in a discriminatory manner.

Clearly the foregoing e-mail prohibits union literature from being "placed" in the breakroom. It does not preclude employees from "handing out" such literature in the breakroom. Nor is there any evidence that employees were in fact prohibited from handing out union literature in the breakroom. Employers may prohibit the leaving of materials in nonwork areas. See *Page Avjet, Inc*., 278 NLRB 444 (1986); *North American Refractories Co.*, 331 NLRB 1640, 1642–1643 (2000). I shall dismiss this allegation of the complaint.

3. Additional alleged violations of the Act

Employee Ron Taylor testified that a few weeks prior to the election, while he was distributing union literature on a public sidewalk outside the hospital, a security guard approached him and said that he was not allowed to interfere with employees entering the building and was not allowed to block the sidewalk. Taylor replied that he was not blocking the sidewalk, that he was merely handing out literature, and that the employees who had stopped on the sidewalk to talk to him did so of their own free will. Taylor suggested that if the security guard had any objection to his continuing to distribute literature on the public sidewalk he should call the "Chief of the Police Department." The guard just got in his car and left. Taylor remained at that location and continued passing out leaflets, and he, as well as other union activists, have continued to do so on other occasions at other locations. According to Taylor, that was the only time anyone had challenged his right to distribute literature outside the hospital.

I shall dismiss this allegation of the complaint. Clearly, this was an isolated instance where a security guard simply believed that Taylor was blocking the sidewalk while passing out leaflets. Taylor pointed out that he was not blocking the sidewalk and had a right to do what he was doing, the guard left, Taylor continued his union activity, and no further incidents of this nature ever occurred.

Beth Denham is a licensed vocational nurse. In January 2003, Denham was verbally counseled by her supervisor, Kerry Cannell, for violating hospital policy by soliciting for the Union by telephone from a patient's home where she was giving in-home respiration therapy. There is no contention that this discipline was unwarranted or inappropriate. During the disciplinary interview Denham was accompanied by Ron Taylor and Kathy Lambert, union supporters. Taylor was a member of the Union's rapid response team, a group of union activists who were designated and authorized by the Union to represent or support employees regarding union-related matters with management. Denham testified that she brought Taylor and Lambert to the meeting for support. Taylor, and apparently Lambert, were wearing their union lanyards during the meeting. At one point during the meeting, according to Denham, Cannell said, "Okay, everybody, let's put our pencils down . . . off the record . . . what are the employees' concerns with management, and why are the employees getting together to form the Union?" Taylor addressed the questions posed by Cannell, and cited several examples, such as decreasing health benefits coupled with increasing costs, and a feeling of distrust and lack of the family feeling that had prevailed in the past. Cannell said, "Well, I have some problems with the way things are done." The conversation lasted about 5 or 10 minutes.

Taylor, apparently conceding that Cannell may not have specifically told the group to put their pens down, characterized Cannell's request as follows: "She basically said what is it that you are representing, why do you think that you need to have a union here. And just, you know, let's be friends and not take any notes on this particular issue." Again characterizing this conversation, Taylor said, "it was my impression she just wanted to be casual and have this not be a part of a formal declaration or recording, that she just wanted to discuss this on a personal level with me."

Cannell who at the time of the meeting was Nurse Manager of Home Care Services, denies that she questioned the employees about the Union. I credit the testimony of Taylor, and find that Cannell did ask the employees why they believed they needed a union. I further find that this question by Cannell did not constitute coercive interrogation. Denham was clearly a

[5] It does not appear that this issue is included within the Union's election objections, infra. However, even assuming that the Union's election objections encompass the Respondent's unlawful conduct in prohibiting the wearing of "Ask me about" cards, it is clear that such conduct could have had minimal if any impact upon the results of the election. Thus, employees were not prohibited from wearing abundant materials in support of the Union, and the "Ask me about" side of the card is, in effect, redundant, as it was designed to serve the same purpose as the "Committee Person" side of the card. Further, the Respondent explained to the employees why it believed the "Ask me about" side of the card was objectionable, and the Respondent's rationale was reasonable on its face and not discriminatorily motivated.

union advocate, as she was being counseled for impermissibly engaging in union solicitation during work. She was permitted to bring two other union advocates with her during the counseling interview. It appears from Taylor's description of the meeting, that Cannell was simply attempting to ascertain, in a personal and nonconfrontational manner, from visible union activists, why they believed that a union was needed. Taylor, as spokesman, was not reluctant to respond, and during the discussion Cannell stated that she too had some problems with the way things were done around the hospital. I do not believe that, under the circumstances, Cannell's question constitutes coercive interrogation. I shall dismiss this allegation of the complaint.

IV. ELECTION OBJECTIONS

A. Background

Pursuant to Stipulated Election Agreements approved on March 10, 2004, in three separate units, an election was held on April 1 and 2, 2004. There were a total of approximately 985 eligible voters in all three voting units: the business office clerical unit (Case 20–RC–17937, with approximately 135 eligible voters), the service unit (Case 20–RC–17938, with approximately 600 eligible voters), and the technical unit (Case 20–RC–17939, with approximately 250 eligible voters). The three tallies of ballots show that a total of 870 employees voted.

The ballots were counted on April 2, 2004. The official tally of ballots for each unit show that the 15 unresolved challenged ballots in the business office clerical unit were sufficient to affect the results of that election; that the 25 unresolved challenged ballots in the service unit were sufficient to effect the results of that election, and that the 6 unresolved challenged ballots in the technical unit were not determinative and the Employer received the majority of valid votes cast.

Thereafter, the Union filed timely elections objections in the technical unit election, and the Employer filed timely election objections in the business office clerical unit and the service unit elections.

During the hearing in this matter all challenged ballots were resolved. On August 18, 2004, during a hiatus in the hearing, the challenged ballots in the business office clerical unit and the service unit were opened and counted and a supplemental tally of ballots was issued in these two units. The supplemental tally of ballots in the business office clerical unit showed that the final vote count was 64 to 64 and that therefore the Union did not receive a majority of the valid votes. Thereafter the Employer withdrew its objections to that election. The supplemental tally of ballots in the service unit showed that the final vote count was 263 in favor of the Union and 245 in favor of the Employer, an 18 vote difference, and that the Union had received the majority of valid votes.

Thereafter, during the course of the hearing, the Union presented the following evidence in support of its election objections in the technical unit, and the Employer presented the following evidence in support of its election objections in the service unit.

B. Union's Election Objections

The Union filed timely objections to the election in the technical unit (Case 20–RC–17939). The Acting Regional Director set the following objections for hearing:

> 1. The Employer, by its agents, interfered with the rights of employees by singling out known Union adherents and publicly insulting them.
>
> 2. The Employer, by its agents, interfered with, restrained, and/or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act.
>
> # # #
>
> 5. The Employer, by its agents, engaged in surveillance of employees as they were voting in the National Labor Relations Board conducted election, interfering with the laboratory conditions necessary for the conduct of a fair election.

1. Facts, analysis, conclusions, and recommendation

(a) Union Objections 1 and/or 5

Ron Taylor is a respiratory therapist, and an active union adherent. His job requires him to be on all floors of the hospital. In the basement of the hospital is a report room that is lined with chalk boards containing patient information. The bulletin boards show which patients are assigned to which therapists, and contain information relating to the patients' status and condition so that information is passed from therapists going off duty to therapists coming on duty. According to Taylor, the therapists would be in the report room during the 7 a.m. transfer of shifts, the 3 p.m. transfer of shifts, and the 7 p.m. transfer of shifts, as well as other times during the day to use the fax machine or to receive new orders. Generally, two shifts would be in the report room at the same time, and this is also when his supervisors, Robert Morejohn or John DiMercurio may be in the report room. Taylor acknowledged that it was not unusual for Morejohn to be in the report room, and that even before the union activity started Morejohn would be there four or five times a day. However, Taylor maintains that after he became active on behalf of the Union, Morejohn spent an inordinate amount of time in the report room while Taylor was there, and that "It seemed to me at that time that it was more purposeful his being in the vicinity." Further, Taylor maintains that beginning in October 2003, when his name was published in union newsletters as a member of the Union's organizing committee, he began receiving extra attention from his managers and supervisors, both in the report room and while he was on the floor of the hospital. Thus, the supervisors would try to get as close as possible to him so that they could overhear his conversations. Taylor acknowledged that after becoming a union activist he became more sensitive to the presence of supervisors. After the election, according to Taylor, such monitoring of his activities stopped.

Robert Morejohn is the technical director of Respiratory Care, Neuro-Diagnostics and Disorders Clinic. Morejohn testified that he has a daily routine that has not changed in the last 7 years. He frequently has occasion to be in the report room, particularly during shift changes, so that the oncoming therapists may be updated. Morejohn testified that he never fol-

lowed Ron Taylor throughout the hospital, or monitored his activity in the report room or anywhere else, nor did he give or receive instructions that Taylor's duties should be monitored. I credit the testimony of Morejohn.

John DiMercurio is respiratory care supervisor. He does scheduling, assigns shifts, and also works directly with patients. He goes into the report room on a daily basis, probably 20 times a day, and has occasion to be up on the various floors of the hospital about ten times a day. He has not changed his routine or job duties in the past 2 years. DiMercurio testified that Taylor reports directly to him, that he frequently eats breakfast and lunch with Taylor, and that they are social friends and have played racquetball together. DiMercurio testified that Taylor never said that he believed Morejohn was following him around or spending more time in the breakroom when Taylor was there. However, he did tell DiMercurio that he felt there used to be a better bond between him and Morejohn, and that there was "just not the same kind of warmth." DiMercurio testified that he has not followed Taylor around the hospital or monitored his activities. I credit the testimony of DiMercurio.

Taylor's testimony was not convincing, and although he may believe that he was being followed and kept under surveillance by managers and supervisors, his testimony indicates that his beliefs are premised on the suspicion that, as a professed union activist, management would want to keep an eye on him; and he articulated no particular, discrete event that would reasonably validate this suspicion. Moreover, I have credited the testimony of Morejohn and DiMercurio, who convincingly denied that they or any other supervisors were asked to monitor Taylor's movements while on duty or in fact did so. I find that there is no merit to this allegation of objectionable conduct.

The Union maintains that an employee was insulted by a supervisor and was advised by another supervisor that hospital management considered him to be a troublemaker. Rodney Willis is a member of the Union's organizing committee. He was given a reprimand by Jan Ellis, director of nursing, for spreading "deception or mis-truths on the floor" by apparently giving false information about staffing to a coworker. Ellis reprimanded him at a nurse's station in front of a charge nurse, and Willis felt that this violated his "confidentiality." He told Ellis that he would "cease and desist my activities" regarding this matter of staffing. A week later, he received a written warning for the same incident. Later, a charge nurse, whom Willis identified as Craig, told Willis that he was viewed as a "rabble rouser at work." Willis admitted, "It's a general consensus" that "pretty much" everyone in his unit would characterize him as a "pot stirrer," and that he was "for patient care . . . so . . . I'm different." While Willis believes that Craig is a supervisor, the evidence shows that the individual in question is Craig Bonner, who is a relief charge nurse and not a supervisor.

The Union does not appear to take the position that Willis' reprimand and warning was unwarranted, but rather that he should have been reprimanded in private rather than at a nurses station where other employees could observe or overhear the conversation. There is no showing that the reprimand was given at the nurses station in order to embarrass Willis because he favored the Union. Nor is there any showing that this was an inappropriate place or unusual place for a reprimand. Further, the relief charge nurse who told Willis that he was viewed as a rabble rouser at work, was not a supervisor, and there is no showing that his statement was other than his personal opinion. As Willis acknowledged, he was considered by coworkers generally as a "pot stirrer." Therefore, I find that the foregoing incidents did not constitute objectionable conduct.

The Union maintains that employees and union organizers who entered the hospital premises, including the cafeteria, were followed, observed, and/or required to leave the premises. Several off-duty employees, all of whom were known to be union activists, testified that on various occasions prior to the election they, and the individuals that accompanied them throughout the hospital or were with them in the cafeteria, were asked to leave the hospital by supervisors, managers, or security guards. These individuals were then either escorted to the entrance of the hospital, monitored, kept under surveillance in the hospital or the cafeteria, or approached by supervisors, managers, or security guards, and asked whether they had legitimate business in the hospital, such as, for example, visiting a patient. One on-duty employee, a known union activist, was in the cafeteria at a table with a nonemployee union organizer, and this table was kept under surveillance.

The Respondent has a rule prohibiting employees from entering the hospital premises during off-duty hours, unless they have "hospital business or are here to visit patients, seek treatment, attend the occasional unit or department function, etc." The Respondent also has the following policy regarding solicitation or distribution of literature by nonemployees: "Outsiders: Persons not employed by the hospital may not solicit or distribute literature on hospital property at any time for any purpose."

There is no contention or evidence that the foregoing rules are invalid or have been discriminatorily applied, and the Union does not set forth any rationale to support its objection that the Respondent's conduct regarding off-duty employees or nonemployee union organizers was improper. Therefore, it appears that the Respondent's conduct in monitoring the activities of these off-duty employees within the hospital, asking them whether they had legitimate business in the hospital, and/or requesting them to leave the premises, was reasonable, as the off-duty employees who were not visiting patients or who had no other legitimate business in the hospital were clearly in violation of the Respondent's established policy. *Tri-County Medical Center, Inc*., 222 NLRB 1089 (1976); and see *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 939, (4th Cir. 1990). Similarly, as the union organizers were violating the Respondent's policy prohibiting nonemployee access to its property, the Respondent had a right to monitor the activities of and/or exclude nonemployee union organizers from its premises, including the cafeteria. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Farm Fresh, Inc.*, 326 NLRB 997 (1998); *Farm Fresh, Inc.*, 332 NLRB 1424 (2000); *Oakwood Hospital v. NLRB*, 983 F.2d 698, 703 (6th Cir. 1993). Accordingly, I find that the foregoing incidents did not constitute objectionable conduct.

The Union maintains that during the election on April 2, 2004, two security officers at a voting site stood outside the main entrance of the Conference Center building and observed voters entering the building. Lisa Bogen, an observer for the

Union, testified that she asked the security guards what they were doing there, and they replied that they were making sure that there were enough parking spaces for voters to park. The evidence shows that the parking lot surrounding this building is often full. The Respondent's witness, Pam Sime, who is no longer employed by the Respondent, was vice president of human resources. Sime testified that the Conference Center is a very busy place. Therefore, four parking places were designated and marked for voters only, and the security guards were asked to make sure that only voters parked in those spaces. The guards were instructed not to discuss the election with voters other than to ask if they were there to vote. This seems like an appropriate way to insure that voters were able to find a parking space, and I find that the voters, being aware that the security guards were there for a legitimate purpose, were not coerced by the presence of the security guards. I find that this incident does not constitute objectionable conduct.

(b) Union Objection 2

As noted above, Union Objection 2 is as follows: "The Employer, by its agents, interfered with, restrained, and/or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act." While the objection language is itself conclusionary and nonspecific, the Acting Regional Director set this objection for hearing for reasons stated in his Report on Objections.[6]

Frank Hardisty is a radiation therapist and has been an employee for over 4 years. He volunteered to be an election observer for the Union. Hardisty testified that he had told "'pretty much everybody" that he was prounion, including his supervisor, Lisa Bidlock, manager of the radiation therapy department. A day or two before the election he approached Bidlock and asked her if he could have the time off to be an election observer for the Union. Bidlock said yes, and then went on to say that someone in human resources was "shocked" to find out that he was a union sympathizer, and there were going to be a lot of people upset with him in the Cancer Center if he acted as an observer during the election. Hardisty asked what Bidlock would do, and Bidlock said, "I can't tell you what to do," and proceeded to tell him that she was a good Christian woman and that acting as election observer "would be like having a tattoo around my neck and people would know me for what I am." Hardisty asked what she meant, and Bidlock "said something like Satan comes in many disguises and that I should consider it, whether or not I should do this." Hardisty did act as an election observer despite the cautionary language from Bidlock. He does not recall whether he told any other employees about this conversation prior to the election.

Bidlock testified that she hired Hardisty, and that although she assumed Hardisty was prounion, Hardisty never came to her and told her that he was prounion. Further, Bidlock testified that the conversation Hardisty testified to never happened, and that Hardisty never came to her office to ask for time off to act as a union observer.

I credit the testimony of Hardisty, and find that Bidlock, his manager, told him that someone in human resources was shocked to find out that he was a union sympathizer, that a lot of people would be upset with him for acting as a union observer, and that it "would be like having a tattoo around my neck and people would know me for what I am." Clearly, such statements from Bidlock show disapproval of Hardisty's union activity. I find that such statements are coercive and would tend to cause Hardisty to discontinue his support for the Union for fear of adverse repercussions from his supervisor or management.[7]

Aaron Dubois was a per diem paramedic and worked for the Respondent for 2 years until he was discharged in June, 2004, some 2 months after the election. He worked in the ambulance division of emergency services. In January or February 2004, Dubois was having a "mutual" conversation with Chris Banks, a supervisory charge medic. The two were kind of "rallying for against" (sic) the Union, and Dubois was expressing his reasons for supporting the Union. According to Dubois, Banks mentioned that a previous union organizing campaign did not get as far as a vote "for fear that had a union come in" the hospital would most likely contract out the emergency portion of its ambulance service. This issue, according to Dubois, namely the contracting out of the emergency ambulance service,

> was, among my co-workers it was a constant topic of discussion . . . that Enloe would opt to not retain the ambulance service. *Throughout my employment* that was the topic of conversation that . . . the emergency aspect of it would be sold off . . . the EMS Division was barely making it. (Emphasis supplied.)

Dubois testified that in March 2004, at a staff meeting conducted by two human resource representatives, the approximately 20 assembled employees were told of the Respondent's position regarding the Union. One of the representatives said that the nurses had voted a union in and "they didn't get anything so what makes you think you're going to." During the meeting, according to Dubois, there was an animated and sometimes "passionate" discussion between pro and antiunion employees about various matters, including whether the hospital would contract out or get rid of the emergency ambulance services. Dubois testified that Marty Marshall, director of ambulance services, who is Dubois' supervisor, came in late during the middle of the meeting, and was "trying to kind of mediate" the two groups of employees, and asked them to calm down. Dubois testified that at one point during the discussion among the employees regarding whether the outcome of the union election might have an influence on the contracting out of the emergency ambulance services, Marshall said, "hey look guys, I'm just trying to save your jobs here, you know . . . I need you guys to help me help you."

[6] The Employer maintains that the Acting Regional Director misapplied Board law in finding that although Union's Objection 2 was not specific, nevertheless under the circumstances herein, he had authority to broaden the investigation to include areas not mentioned in the objections. See *White Plains Lincoln Mercury, Inc.*, 288 NLRB 1133, 1137 (1988). As I have determined, infra, that Union Objection 2 should be overruled, it appears unnecessary to address this argument of the Employer.

[7] While not entirely clear, it appears that Hardisty's discussion with Bidlock is included within Union Objection 2.

Linda Irvine, human resources director, testified that she was invited to come to the meeting by Marshall to answer questions about the upcoming election. She estimated that 30 employees were present. Marshall introduced Irvine and Weintraub, director of materials management, to the group and said that they were there to answer questions. They presented the Hospital's collective-bargaining agreement with the California Nurses Association (CNA) and provided information about what was in the agreement. This contract, according to Irvine, was used as an example of an actual, current union contract. She pointed out that the benefits in the contract were the same as the benefits that the other employees also had. She did not state, contrary to the testimony of Dubois, "what makes you think you can get any more than that?" According to Irvine, Marshall didn't participate much during the meeting, and didn't ask for the employees' help or say that he was trying to save their jobs. The discussions among the employees were "spirited," and Marshall may have asked them to make sure they were respectful of each other. Sometimes there were several separate conversations among the employees at the same time.

Alan Weintraub, director of materials management, was at the meeting. He testified similarly to Irvine regarding the meeting, and corroborated Irvine's testimony that Marshall didn't make the statement attributed to him by Dubois.

Marty Marshall, director of emergency services, has been employed by the Respondent since 1985. He has monthly meetings with his staff. He invited Irvine and Weintraub to answer questions about the Union organizing effort so his staff would be well-informed. After introducing them, he said that there would be an open forum and the employees could ask questions. Some staff members were very vocal about their opposition to the Union and felt threatened about the whole organizing effort. Marshall said nothing during the meeting about needing the employees' help so he could help them. He recalls one employee expressing concern that the ambulance employees could lose their jobs if the Union came in.

Marshall testified that there has always been a possibility that the ambulance services could be contracted out, and that for many years other ambulance companies have been eager to take over the hospital's emergency business. Thus, over the years he has continually cautioned the employees that the only thing they could do to preserve their jobs was to ensure that their performance was superior to the competition. Marshall testified,

> I've had discussions with [employees] for probably six or seven years. The only thing we can do to prevent this is to do a better job than [other ambulance services] can . . . and that had nothing to do with the union. That's what they've been taught from the beginning that there are people . . . who would love to come in and take care of the business for us. As long as we're doing a better job than they—and that's where their job security is derived from.

Marshall terminated Dubois after counseling him on numerous occasions for speeding in the ambulance, for patient care issues, and finally, for running a red light in his ambulance.

I credit the testimony of Marshall, Irvine, and Weintraub. It should be noted that although there were between 20 and 30 employees in attendance at the meeting, including vocal pro-union employees, no witnesses were called to corroborate Dubois' testimony. Also, it appears that Dubois' recollection of the meeting is faulty, in that Marshall, I find, was present at the beginning of the meeting as he introduced Irvine and Weintraub, and thus did not arrive late, during the middle of the meeting, as Dubois testified. It appears that Dubois' recollection may simply be mistaken, and that he is confusing this meeting with some other meeting Marhall conducted. Thus, I find that Marshall, over many years, and long before the Union began its organizing campaign, had consistently cautioned the employees that other companies were eager to take over the Respondent's ambulance services, and encouraged the employees to maintain a high level of performance to prevent this from happening. Accordingly, I conclude that the Employer engaged in no objectionable conduct during the meeting in question.

Regarding Dubois' conversation with Banks, Dubois testified Banks said that during a previous union organizing campaign the employees felt that the hospital would most likely contract out the emergency portion of its ambulance service if the union got in. Thus, it appears that Banks was simply relating to Dubois' concerns that other employees had during a prior organizing campaign, but did not express his own opinion about that matter. Significantly, Dubois did not testify that Banks expressed any opinion about what the Respondent might do if the Union was successful in the current election. I conclude that the statement by Banks was not coercive, and that this incident does not constitute objectionable conduct.

(c) Union's objections: conclusions and recommendation

I have found that the Employer engaged in one instance of objectionable conduct, namely, the cautionary language from Manager Bidwell to Hardisty, in which she expressed disapproval and cautioned him that his participation as an observer for the Union during the election may not be in his best interests. There is no evidence that Hardisty related this conversation to other unit employees prior to the election. This one incident is insufficient to invalidate the election, and I recommend that the Union's objections be overruled and that the results of the election in the technical unit (Case 20–RC–17939) be certified.

C. Employer's Election Objections

1. Background and objections

The Employer filed identical objections to the election in the two units in which the challenges were determinative, namely the business office clerical unit, and the service unit. After the parties reached agreement on the challenged ballots in these two units, the challenged votes were counted. The Employer prevailed in the business office clerical unit election and thereupon withdrew its election objections in that unit. Therefore, its remaining election objections pertain to the service unit in which, after the challenged ballots were counted and a revised tally of ballots issued, a majority of votes were cast for the Union.

The Employer presented evidence in support of the following election objections:

3. Several employees voting at different polling sites were given a ballot of a color representing a voting unit other than their own voting unit, and the ballots were cast and placed in the ballot box before the mistakes were discovered.

4. On at least one other occasion at the Cancer Center polling site, a voter was given the wrong ballot, although an observer noticed this particular error by the Board Agent, and brought it to the attention of the Board Agent in time to avoid the error.

5. At least two employees whose ballots were challenged by a Board Agent at one of the polling sites, believed to be the EOC voting site, because they were not on the "site" list for that site, were given the wrong color ballots. Both were technical voting unit employees, and both were given service unit ballots. These errors were discovered and acknowledged by the Board agents conducting the election when the voters' names were cleared as having voted at only one location, and their envelopes were opened and the Board agents were starting to remove the ballots to be co-mingled with the unchallenged ballots. Other challenged ballots when opened, might reasonably be expected to reveal additional erroneously distributed ballots, and there is no way of knowing how many other service unit ballots were given to unchallenged employees from one of the other voting units.

2. Background; the Employer's position

The election in the service unit was one of three elections simultaneously conducted among the Employer's employees, over a 2-day period, at five separate locations. There were a total of 14 voting sessions and the polls were open for a total of about 30 hours. Any employee in any unit was entitled to vote at any location during any voting session. In order to differentiate between units, voters were given one of three different colored ballots designated for their particular bargaining unit: *white* for service unit voters, *pink* for business office clerical unit voters, and *green* for technical unit voters. There was one ballot box at each site, and all the ballots, regardless of unit, were placed in that ballot box. At the conclusion of the voting, the ballots in the various ballot boxes were separated according to color or, in the event of challenged ballots, according to the unit designated on the challenge envelope, and then counted.

The Employer maintains, essentially, that since there is clear evidence that some voters, regardless of their unit, were inadvertently but erroneously given the wrong color ballots by Board agents conducting the election, it is likely that many other similar but undetected errors were made; therefore, it is simply impossible to know whether the revised tally of ballots in the service unit correctly reflects the true intention of the majority of service unit employees.[8] In other words, service unit employees may have been given pink or green ballots and therefore their vote would not have been included or counted with the white service unit ballots; and nonservice unit employees may have been given white service unit ballots, and therefore their votes would have been erroneously included and counted as service unit votes.

3. Facts, analysis, conclusions, and recommendation

(a) Uncontested facts

There is clear evidence that some voters were given the wrong color ballot. Thus, in the technical unit (green ballots), during the original counting of the ballots, 23 site-challenged ballots were opened.[9] Twenty-one were correct green technical unit ballots and two were incorrect white service unit ballots. However, since the challenge envelopes identified the name and voting unit of the voter, these white ballots were clearly cast by technical unit employees.

As noted above, during the hearing herein the non"site" challenges were resolved for the two units still in contention, namely, the business office clerical unit, and the service unit. Thereafter, during the opening of the challenge envelopes (nonsite challenges) of the 12 eligible voters in the business office clerical unit (pink ballots), it was found that 10 ballots were the correct pink color, and 2 were incorrect white service unit ballots. Again, however, because the challenge envelopes identified the name and unit of the voter, these white ballots were clearly cast by business office clerical unit employees. And during the opening of the challenge envelopes (nonsite challenges) of the eleven eligible voters in the service unit (white ballots), all 11 contained the correct white ballots.

(b) Voting at the Enloe Outpatient Center site

Ruth Phillips, a business office clerical unit voter, acted as an election observer for the Employer. Phillips testified that prior to the election she attended a meeting and was given the "Instructions to Election Observers" document. Also, she spoke to the Employer's attorney prior to the election, and was given instructions regarding her duties as an election observer; these instructions included watching out for the color of ballots that voters were given.

According to Phillips, two Board agents were overseeing her particular voting session. Phillips testified that the Board agent handing out the ballots and preparing the challenge envelopes would hand all the challenged voters "gray" ballots.[10] Phillips

[8] The Employer has made appropriate requests to the Regional Director and the Board's General Counsel that the Board agents conducting the election be permitted to testify in this proceeding. These requests have been denied. In its brief, the Employer states that it was seeking "relevant testimony about [the Board Agents'] own actions, the procedures they followed, if any, etc. . . . that would better establish what took place, and would show whether Board Agents conducting the election were experienced in conducting, or trained and prepared to conduct, multiple-unit, multi-site elections, which could suggest whether the errors were anomalous, or reflected but the tip of the iceberg, and whether their indisputable errors destroyed any possible confidence in the Board's election process. . . ."

[9] It had been agreed by the parties prior to the election that the ballots of voters who voted at sites other than their home site, where they were expected to vote, would be placed in a challenged ballot envelope so that, prior to their vote being counted, it could be verified that they did not also vote at their home location where their ballots would not have been challenged. These challenges were called "site" challenges.

[10] White ballots were also referred to by witnesses as off-white, silver, or grey ballots; however they are referred to herein as white ballots.

was specifically asked, "So, if they were tech [technical unit] people that came in and they were challenged, they still [were given a white ballot]." Phillips answered, "Correct." Phillips testified that she was watching the Board agent hand the ballots to the voters, including those voters who were challenged, and he gave each challenged voter the same white color ballot; she estimated that somewhere between 10 and 20 voters cast challenged ballots. Further, she testified that the names of all the challenged voters were being added to the list of service unit voters event though all were not service union employees. She asked the Board agent why all the challenged voters, regardless of unit, were being given white ballots, rather than the correct color for their particular voting unit, and why the names of all the challenged voters, regardless of unit, were being entered and marked as being challenged on the service unit voter list. The Board agent acknowledged that he had given all of the challenged voters a white ballot, but indicated that was not a problem because "they would check to see where they belonged once they looked at the challenged ballots."

It appears that Phillips was conscientiously attempting to fulfill her job as an election observer by questioning the Board agent's decision to give all the challenged voters, regardless of unit, the same white ballots, and to enter all the challenged voters names, regardless of unit, on the service unit voter list. The Board agent explained to Phillips that this did not appear to be a problem, as the challenged ballots, regardless of their color, would end up being counted in the appropriate unit. While the Board agent was correct, it does seem in retrospect that his decision was shortsighted since, as it turned out, with only a few ballots of the wrong color being counted, and the voters being identified on the challenge envelopes, it might be possible to ascertain how particular voters voted. However, this misjudgment could not have affected the results of any election.

(c) Voting at the Enloe Rehabilitation Center site

Lynette Benson, an admissions clerk, was called as a witness by the Employer. Benson was in the business office clerical unit. She acted as an election observer for the Employer during the election at the afternoon session at the rehabilitation site. A single Board agent conducted this voting session. There were two tables, one for the technical unit and one for both the service unit and business office clerical unit,[11] with a union and employer observer at each table. The voter would be directed to the correct table. The observers would verify that the voter's name was on the eligibility list, and would advise the Board agent of the unit the voter was to vote in. The Board agent would then hand the voter the appropriate ballot for that unit. The Board agent was the only person who handed the ballots to the voters. Benson sat at the technical unit table; technical unit voters would receive a green ballot from the Board agent.

Benson testified that she "basically" does not believe the Board agent gave her any instructions regarding her duties as an observer, but also testified that she "could have been" given such instructions; however, she has never seen the standard Board handout entitled "Instructions to Election Observers." Benson also testified that the day prior to the election she was given instructions by one of the attorneys for the Employer.

Regarding the instructions she recalls receiving,[12] Benson testified:

> My instructions were to make sure that we watched for any inappropriate behavior on the part of employees, and to make sure that everybody stated their name and was given a ballot and was instructed on how the ballot works.
>
> And if any ballots were challenged, that the procedure would be explained to them.

Benson testified that many people voted during the first part of the voting session, and only one voter at a time was allowed in the voting room. She saw voters vote on green and white ballots. Then, after about 35 or 40 minutes, during a lull in the voting, she had the opportunity to vote. At this point only one other business office clerical unit employee had voted, and Benson did not see the color of that individual's ballot.[13] Benson, who was also in the business office clerical unit, received a ballot from the Board agent and placed it in the ballot box. Later during the session, Benson noticed that a technical unit voter was about to be handed a pink business office clerical ballot, but the Board agent, recognizing that she was about to hand the voter the wrong color ballot, correctly handed the voter a green technical unit ballot. At this point Benson realized that when she had voted she too had been given a green technical unit ballot by the Board agent. She asked the Board agent whether business office clerical employees were supposed to vote on a green ballot, and the Board agent said no, those employees were to vote on pink ballots. Benson advised the Board agent that she had been handed and voted on a green ballot. The Board agent said she (the Board agent), would have to contact her supervisor to find out what to do about that.

Later during the session, the Board agent asked Benson whether she was sure that she had been given the wrong color ballot, and Benson replied she was "absolutely sure." The Board agent then asked the other three observers whether they had seen the color of Benson's ballot, and they said no. Then the Board agent said to Benson, in an explanatory and nonconfrontational manner, that it was basically "your word against mine." Benson testified that she is sure she voted on a green ballot because green is her favorite color, and when she voted she was thinking, "how cool is this, I get to vote on green." She was extremely upset and reported this to the Employer's attorney immediately after the voting session. She does not know whether the Board agent made any other errors during that session.

Janet Lezzeni is a member of the technical unit. She acted as an observer for the Employer during the same session as Benson, supra. Lezzeni did participate in a preelection conference the day prior to the election, and was given a standard handout entitled "Instructions to Election Observers." Also, just before

[11] There were only four business office clerical unit employees, including Benson, who were on the list to vote at this site.

[12] It is not certain from the record whether she received these instructions from the Board agent or the Employer's attorney.

[13] Later, this voter did verify to Benson that she had correctly voted on a pink business office clerical unit ballot.

the election was to begin, she received instructions from the Board agent that "we were to sit down at the table, not speak to anybody when they came in the room. They [the voters] were just to come to the table, state their name and [the Board agent] was to hand them the ballot, and they were to go vote." Lezzeni testified that "at times" she would watch the Board agent give the ballots to the voters, but her testimony does not indicate that she was given specific instructions to do so.

Lezzeni testified that she voted about 20 minutes before Benson, and was correctly given a green ballot. She corroborated Benson's testimony that during the session Benson advised the Board agent that she had given Benson the wrong color ballot. The Board agent said, "I don't believe I did." Benson became upset and told the Board agent, "I need to speak with the lawyer outside." The Board agent told Benson she would have to wait until the voting session was over.

Although Benson may honestly believe she was given the wrong color ballot by the Board agent, I conclude that this belief is not supported by a reasonable evaluation of the evidence. Benson was an election observer and watched many people vote prior to the time she voted. Obviously she knew that voters were being given different color ballots according to their voting unit, as the observers would advise the Board agent what unit a voter belonged to so that the Board agent would give the voter the correct ballot; indeed, the only purpose for calling out the voting unit was to advise the Board agent of the particular ballot to give the particular voter. Benson recalls voters being given green ballots and white ballots. Then Benson, who acted as an election observer at the technical unit (green ballot) table, and knew that technical unit voters were given green ballots, and also knew that she was not a technical union voter, and, at the time she voted, was particularly cognizant of the green ballot she had been given, specifically thinking, "how cool is this, I get to vote on green," nevertheless did not either immediately advise the Board agent that she was being handed the wrong color ballot, or ask the Board agent why she, as a business office clerical unit voter, should be voting on the same color ballot as the technical unit voters; rather, it was not until later during the voting session that she reached the conclusion she had voted on the wrong ballot. From the foregoing, I simply do not credit Benson's testimony that she was given the wrong color ballot.

Further, it makes no difference under the circumstances whether Benson received the correct ballot. Benson testified that she voted on a green ballot and should have voted on a pink ballot; but the employees in the voting unit in question, the service unit, received white ballots. Accordingly, even if Benson had incorrectly been given a green ballot, this could have had no effect on the service unit results. Benson's testimony was proffered by the Respondent to show a systemic problem with the manner in which Board agents simultaneously conducted all three elections. In fact the evidence presented by the Respondent shows no such systemic problem.[14]

(d) Voting at the Cancer Center site

Marilyn King was called as a witness by the Employer. King voted in the business office clerical unit. On Thursday morning King went to her voting location, the Cancer Center site, with three other voters; they were the first ones there. King testified that after checking in with the election observers she was given a ballot by the Board agent. By that time more voters had entered the room and the Board agent, according to King, was "getting very confused" and "flustered," and threw up her hands and said, in a loud voice, something like, "Wait, I can do just one thing at a time. "This remark caught King's attention, and she then observed the apparent reason for the Board agent's remark, namely, that two people were then trying to speak with the Board agent at once. King testified that although there was no noise in the room, "it was just too chaotic for [the Board agent] when really there was just a few people." King testified that she was given a white ballot, and voted. The following day, Friday, King went to the ballot counting and realized that she had not been given a pink business office clerical unit ballot by the Board agent. She did not know until that time that voters had been given different color ballots according to their voting unit. The following Monday at work, during a routine business office meeting, she mentioned to her supervisor that she had voted on the wrong color ballot.

Denise Ballinger was called as a witness by the Employer. Ballinger voted in the business office clerical unit. She went to the voting place with King, supra, and two other employees. According to Ballinger, "We all walked in at one time. And there was some other people already in there. And so it was a big crowd of people. And I was the first one to get the ballot and I went in to the ballot booth and voted while the others were being checked on the checklist." Ballinger testified that "there was quite a bit of commotion going on" and at one point the Board agent threw up her hands and "yelled out, I can only handle one person at a time." According to Ballinger, "it was kind of distracting, and I thought this is kind of chaotic in here." Although Ballinger had previously testified that "a big crowd of people" were in the room, when asked how many people were in the room she replied, "I think around seven."

Ballinger, after she had voted during the morning session, acted as observer for the Employer during the afternoon session. There were no business office clerical unit voters at that afternoon session and only about eight voters in all, as most of the voters at that location had voted during the morning session. As an observer she was given the "Instructions to Election Observers" document, apparently by a Board agent. She was also given election instructions by the Employer's attorney. However, Ballinger does not recall being instructed by anyone that one of her responsibilities as observer was to make sure that voters were being given the correct ballots.

[14] Benson's testimony does indicate that the Board agent was genuinely concerned and not simply dismissive upon being apprised of her possible error: thus, she asked Benson if Benson was sure she had been given the wrong ballot, told Benson that she would talk with her supervisor, asked the other election observers whether they had seen the color of ballot she had handed Benson, and told Benson that she indeed believed she had given Benson the correct color ballot. Finally, the Board agent told Benson, in effect, that there simply was an irreconcilable difference of opinion. While the issue was not resolved, the scenario certainly shows that the Board agent was conscientious in her attempt to resolve the matter.

Ballinger, like King, also attended the counting of ballots on Friday. Even though she observed that there were different color ballots for each voting unit, this did not cause her to question the color of ballot she had been given. The next Monday morning Ballinger happened to attend the same business office meeting as King, and overheard King say that she had voted on the wrong color ballot. Ballinger asked what color her ballot was supposed to be, and was told that her ballot should have been pink. At that point she said she also had been given the wrong color ballot. Ballinger testified that she is "almost positive" and "about 98 percent certain" that she was given a white ballot rather than a pink business office clerical unit ballot because it seemed "just like a regular piece of paper" to her and, since she doesn't like the color pink, she would have remembered a pink piece of paper.

Jacque Wells, a patient support clerk, voted in the service unit. She was an observer for the Employer during the same Thursday morning Cancer Center voting session in which King and Ballinger voted, supra. She does not recall receiving any instructions from a Board agent prior to the election. However, prior to the election she had been instructed by the Employer's attorney to watch what color ballots the voters were being handed.

Wells testified that at the beginning of the voting it was "kind of chaotic." Explaining, Wells testified that one voter showed up early and was asked to leave until the voting session started, and she "left in a huff." Then, after the polls opened, "there were a lot of people who came in all at once. It was confusing. There wasn't a single line. Everybody was just . . . spread out in the room." Wells testified that:

> people were quite talkative. And [the Board agent] finally had to ask people to leave because she got flustered. . . . There was a lot of communication between some of the observers, and we . . . had been told we should be quiet and not chat with everybody. . . . We had one gentleman get a call on a cell phone. He was asked to put it away or to leave the room, and he didn't. And he just continued to keep chatting . . . . There was confusion because we had seemed to, in the first five minutes, have a lot of people that were voting off their site where they should have gone . . . so the votes were challenged.

Wells estimated that at one point there were about 20 people in the room at the same time. She testified that the Board agent "finally had to say, stop, everybody leave the room. We only need one person in here at a time." After that, only one person at a time would come in and vote and, according to Wells, "it was a lot better." The confusion described by Wells lasted for 30 or perhaps 45 minutes, and Wells estimated that about 20 people voted during this period. Wells did not testify that at any point the Board agent threw up her hands in frustration and said she could only do one thing at a time or could only handle one person at a time; nor was Wells asked whether this had occurred. Rather, as noted, according to Wells, at some point, apparently well after the time King and Ballinger would have voted and left the premises, the Board agent told everyone to leave the room because, "We only need one person in here at a time."

Wells testified that she did see everyone get a ballot during her session, and believes that each voter who voted during that session was handed the correct color ballot. Wells also testified that, "In the beginning" she was able to see what color ballots the Board agent gave the voters, "but there were so many people they were challenged right in the beginning that it was frustrating. Little confusing . . . and so . . . she [the Board agent] might have handed a wrong one and I wouldn't have even caught it." Significantly, she was not specifically asked whether she knew King or Ballinger or whether she saw the Board agent give ballots to King and Ballinger. However, Wells testified that she was acting as an observer at the table for both the technical unit voters and the business office clerical unit voters (King and Ballinger were business office clerical unit voters), that these voters checked in at her table, walked to the left where the Board agent was located, and would be handed a ballot by the Board agent. Wells testified, "I could visually see [the Board agent's] hand with the ballot," and did not recall seeing any voter being handed the wrong ballot. On redirect examination by Respondent's counsel, Wells testified:

> Q. Ms. Wells, as you sit here today, do you know if you saw everybody get a ballot?
>
> A. I would say Yes.
>
> Q. And . . . as you sit here today, are you sure that each person got the correct color ballot.
>
> A. I would say, Yes, I thought they did.
>
> Q. But did you not—
>
> A. I can't say for sure, but that day I thought they did.
>
> Q. Did you watch just the people in the Business Office and Technical people that you checked off to see what color ballot they got?
>
> # # #
>
> A. Yes.
>
> Q. And so the people that checked in at the Service table, you're not sure what color ballots they would have received?
>
> A. I tried to watch those also.

Wells, King, and Ballinger were all called as witnesses by the Employer. King and Ballinger, who were the very first or among the very first voters during the voting session, were in the voting room for only a short time, whereas Wells, who was an election observer for the Employer, remained in the room and assisted in the voting process for the entire session. I was particularly impressed by the testimony of Wells; she recalled details that reflected close attention to the voting process and seemed to have a good recollection of the events in question. She was a conscientious election observer, took her duties seriously, and, in particular, did what the Employer's attorney instructed her to do, namely, watch what color ballots the voters were being handed. She testified that throughout the election she could see the Board agent's hands, and that she saw everyone receive the correct color ballot. She also testified that in the beginning, that is, at the time King and Ballinger voted, she was able to see what color ballots the Board agent gave the voters. (It should be recalled King testified that the confusion in the room began *after* she received her ballot from the Board agent.) Summarizing, Wells testified that although she could

be mistaken,[15] she recalls that on the day of the election she believed each voter got the correct color ballot.

Ballinger's testimony that she is "almost positive" and "about 98 percent certain" that she was given a white ballot rather than a pink business office clerical unit ballot is premised on her aversion to the color pink; thus, she maintains that since she does not recall having an adverse reaction to the ballot she was given, it must not have been pink. I do not believe that Ballinger has any recollection whatsoever of the color ballot she was given: her deductive logic is based upon pure speculation rather than refreshed recollection. During the afternoon session Ballinger acted as an observer for the Employer and, even though service unit employees voted on white ballots, she still did not at that time recall that she too may have voted on a white ballot. Then, even though she attended the counting of the ballots for the business office clerical unit (pink ballots) on Friday, it did not register with her that she may not have received a pink ballot until the following Monday, and then only after this possibility was implicitly suggested to her by King. I do not credit Ballinger's testimony. Moreover, there is simply no reason why the testimony of either King or Ballinger should be credited over the testimony of Wells, who, as noted, impressed me as a reliable witness. And although the Employer bears the burden of proof to provide convincing evidence in support of its election objections, here the Employer has proffered witnesses with inconsistent recollections and contradictory testimony. Accordingly, I find that the Employer has not sustained its burden of proof, and that the credible evidence does not show that either King or Ballinger voted on the wrong ballots.

While the testimony of Wells does not seem at first to square with the testimony of King and Ballinger regarding the situation in the voting room, in fact the testimony of all three witnesses makes sense when it is understood they were not talking about the same time frame. Wells testified that prior to the voting an employee entered the voting room and was told to leave by the Board agent; King and Ballinger had not yet arrived at this time. King and Ballinger were the first voters in the room when the voting session commenced. They cast their ballots and left. At that time, there were clearly not some 20 voters in the room; this happened later, as described by Wells.

King and Ballinger testified that at the beginning of the voting session the Board agent seemed frustrated; interestingly, both used the same terminology, "chaotic," to characterize the situation. They went on to describe this apparently chaotic situation as follows: King testified that she observed the Board agent gesturing with her hands and talking to two individuals; and according to Ballinger, the Board agent exclaimed that she could "only handle one person at a time." It seems unusual that both witnesses would use the term "chaotic" to describe a rather unremarkable event. Indeed, from the account given by King and Ballinger, it seems that the Board agent was quite properly doing her job, namely, emphasizing to two individuals who were each vying for her attention that she wanted them to stop talking simultaneously so that she could listen to one at a time. Significantly, Wells apparently did not believe that this particular event was chaotic or even noteworthy, as she did not mention it during her testimony; nor was she asked about it by Respondent's counsel. Accordingly, I do not credit the testimony of King or Ballinger, seized upon by the Respondent in its brief, that there was chaos in the voting room or that the Board agent was not in control of the situation.

As noted, I have credited the testimony of Wells. Wells, too, used the term "chaotic," but to describe a time period after King and Ballinger had left the room. Again, I believe "chaotic" is too strong a term to accurately characterize the situation described by Wells during her testimony. Thus, it appears that some 20 voters had entered the room and became talkative as they waited to vote; and for some reason, perhaps because they did not know which line to stand in, the voters did not form orderly lines at the voting table for their particular unit. Finally, after a period of time Wells estimated to be about 30 to 45 minutes, during which time there were a number of challenged voters to process,[16] the Board agent became frustrated as her efforts to limit the chatter in the room, including the chatter of the observers, was unsuccessful, and the voters seemed uncooperative. At this point the Board agent, according to Wells, "finally had to say, stop, everybody leave the room. We only need one person in here at a time." After that, according to Wells, only one person at a time was permitted to come in and, "things were a lot better."

The Employer presented Wells' testimony in an effort to show that during this period of time the atmosphere in the voting room and the Board agent's frustration could have potentially resulted in the Board agent becoming inattentive and inadvertently handing voters the wrong color ballots. In *Dunham's Athleisure Corp.*, 315 NLRB 689 (1994), the Employer made the argument that the security of the ballot box may have been compromised because groups of voters in the voting room from time to time obscured its observer's view of the ballot box. The Board, finding no merit to this speculative argument, cites the following language from *Polymers V. NLRB*, 414 F.2d 999, 1004 (2d Cir. 1969):

> A per se rule of [setting an election aside if there is a] possibility [of irregularity] would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained. (Brackets in original.)

Moreover, Wells' testimony dispels any such speculation that voters were given the wrong ballots. This testimony bears repeating:

> Q. Ms. Wells, as you sit here today, do you know if you saw everybody get a ballot?
> A. I would say Yes.
> Q. And . . . as you sit here today, are you sure that each person got the correct color ballot.
> A. I would say, Yes, I thought they did.

[15] Clearly, Wells was simply attempting to be cautious and candid, recognizing there is always a possibility that one's recollection may be mistaken; however, her testimony shows that she does not believe she was mistaken.

[16] The processing of challenged voters is relatively time consuming.

Q. But did you not—
A. I can't say for sure, but that day I thought they did.

(e) Employer's objections: conclusions and recommendation

I conclude the evidence does not demonstrate a reasonable doubt as to the fairness and validity of the election.[17] This was an extended and logistically complex election in which voters from three separate units were voting at the same time during a total of 14 voting sessions over a 2-day period at five different locations; and during these voting sessions the polls were open for a total of some 30 hours to accommodate the schedules of 985 eligible voters. The parties agreed to this procedure.

The evidence presented by the Employer shows that during one voting session a Board agent knowingly gave all challenged voters white ballots regardless of their voting unit, and explained to an election observer who questioned this voting procedure that it did not present a problem since the ballots were placed into identifiable challenge envelopes and would end up being counted in the correct voting unit after the challenges were resolved.[18] This is entirely consistent with the further evidence presented by the Respondent that incorrect white ballots, and only white ballots, were removed from challenge envelopes during both the original and supplemental counting of the ballots. As noted, since the challenge ballot envelopes contained the name and unit of the voter, the fact that the voter voted on the wrong color ballot could have had no effect on the election results.

The Employer's evidence also shows that at one session, during a 30 to 45-minute period, the Board agent conducting that session seemed frustrated because of the chatter and irregular lines formed by some 20 voters in the room, as well as the conversation among some election observers. However, the Employer's election observer testified that during this period, as well as during the remainder of the session, she observed the Board agent giving the correct color ballot to each voter.

To summarize, there is no credible evidence that any business office clerical unit voters or technical unit voters cast unchallenged white service unit ballots, or that any service unit voters cast unchallenged green technical unit or pink business office clerical unit ballots. Thus, the evidence presented by the Respondent does not show that any action of any Board agent resulted in any voter casting a ballot in the wrong unit.

Accordingly, I find that no reasonable doubt exists as to the fairness and validity of the election, and that the supplemental tally of ballots in the service unit accurately reflects the voters' intent. I recommend that the Employer's election objections be overruled, and that the results of the election in the service unit (Case 20–RC–17938) be certified.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act as found herein.
4. It is recommended that the Union's election objections be overruled, and that the results of the election in the technical unit (Case 20–RC–17939) be certified.
5. It is recommended that the Employer's election objections be overruled, and that the results of the election in the service unit (Case 20–RC–17938) be certified.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix." On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Enloe Medical Center, Chico, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring employees to remove or cover union identification badges that state "Ask me about our union," or "Ask me about SEIU."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

[17] Indeed, since all three elections were conducted simultaneously, a reasonable doubt concerning the fairness of one election would necessarily raise the same reasonable doubt as to the fairness of all three elections. In that event it appears that the Board, of its own volition, in order to insure the integrity of its election processes, has the authority to invalidate all three elections. It should be recalled that the supplemental tally of ballots in the business office clerical unit showed that the final vote count was 64 to 64 and that therefore the Union did not receive a majority of the valid votes. Thereafter, the Employer withdrew its objections to that election. However, the Employer presented testimony in this proceeding from three business office clerical unit employees that they were given the wrong color ballots by Board agents, and the Employer continues to rely upon such evidence in support of its position that the election in the technical unit should be overturned and a new election conducted.

[18] I conclude the Board agent's method of handling challenged ballots does not raise a reasonable doubt as to the fairness and validity of the election; it amounted to no more than harmless error and could not have affected the results of any of the three elections. *Allied Acoustics*, 300 NLRB 1181 (1990); *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). While the Employer appears to speculate that perhaps this Board Agent made other, more serious mistakes that were in fact material to the outcome of the election, the Employer proffered no evidence to support such speculation.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Regional Office, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, February 14, 2005

APPENDIX

NOTICE TO EMPLOYEES

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require employees to remove or cover union identification badges that state "Ask me about our union," or "Ask me about SEIU."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed them by Section 7 of the Act.

ENLOE MEDICAL CENTER